

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

DUSTIN BENNETT)	
Claimant)	
VS.)	
)	
SCOTT MASONRY, INC.)	Docket No. 255,335
Respondent)	
AND)	
)	
TIG INSURANCE)	
Insurance Carrier)	

ORDER

Claimant appealed the April 26, 2002 Award and May 1, 2002 Nunc Pro Tunc Award entered by Administrative Law Judge Brad E. Avery. The Board heard oral argument on October 23, 2002.

APPEARANCES

Frank D. Taff of Topeka, Kansas, appeared for claimant. Kevin J. Kruse of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award and Nunc Pro Tunc Award.

ISSUES

This is a claim for a March 8, 2000 accident in which claimant injured his right ankle. In deciding this claim, Judge Avery awarded claimant permanent disability benefits for a "scheduled" injury¹ at the lower leg level for a 15 percent functional impairment to the right lower extremity. Moreover, the Judge denied claimant's request for additional temporary

¹ See K.S.A. 1999 Supp. 44-510d.

total disability benefits, including a period of time that claimant was in jail for a parole violation.

Claimant contends Judge Avery erred. Claimant argues that he is entitled to receive additional temporary total disability benefits for the period that he was incarcerated, which he claims was February 13, 2001, through May 31, 2001, along with temporary total disability benefits for the period from October 25, 2001, through December 3, 2001, which is the period when he was recuperating from his last right ankle surgery. Accordingly, claimant requests the Board to award him an additional 21.14 weeks of temporary total disability benefits.

Conversely, respondent and its insurance carrier argue in their brief to the Board that claimant should not receive temporary total disability benefits during the period that claimant was incarcerated. Accordingly, in their brief they request the Board to affirm the Award and the Nunc Pro Tunc Award. In their brief, they argue in the alternative that claimant should not be awarded any temporary total disability benefits after November 2000 as claimant probably would have reached maximum medical improvement sometime between September and December 2000 had he not fallen in November 2000. Moreover, at oral argument before the Board, respondent and its insurance carrier also argued claimant's permanent disability award should be reduced from one for a 15 percent functional impairment to the right lower extremity to one for a 13 percent functional impairment to that extremity.

The only issues before the Board on this appeal are:

1. What is the nature and extent of claimant's injury and disability?
2. Is claimant entitled to receive temporary total disability benefits following November 2000?
3. If so, is claimant entitled to receive benefits for the period from February 13, 2001, through May 31, 2001, when he was incarcerated, and from October 25, 2001, through December 3, 2001, when he was recovering from his last right ankle surgery?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Board finds and concludes:

1. On March 8, 2000, claimant injured his right ankle and leg when he fell off a scaffold and landed on his feet. According to Dr. Kenneth L. Wertzberger, "[t]he fibula was

dislocated anteriorly, all ligaments being ripped from their attachments on the anterior and posterior side of the tibiofibular ligaments.”²

2. On March 8, 2000, Dr. Wertzberger operated on claimant’s right ankle and the fibula to repair the fibula and medial malleolus fractures. Following the surgery, the doctor prescribed physical therapy. According to claimant, he missed approximately three physical therapy appointments as he lacked transportation from Holton to Topeka.³

3. Claimant believes that he was initially off crutches by the end of May 2000 and out of a boot in August 2000.

4. But claimant’s medical treatment with Dr. Wertzberger was interrupted when he was arrested for violating parole. According to his testimony at a February 1, 2001 discovery deposition (which the parties stipulated should be part of the record for purposes of final award), claimant was arrested on September 26, 2000, for failing to report to his parole officer. Claimant was released from custody from January 4, 2001, to January 11, 2001, when he was again arrested for another parole violation. That time, claimant was incarcerated until approximately May 10, 2001.⁴

5. Following September 26, 2000, when claimant was first incarcerated, claimant was given crutches due to unbearable pain he was experiencing walking on his right ankle and leg. According to claimant, the El Dorado prison officials had made arrangements for claimant to see a Wichita orthopedic surgeon, Dr. Jay Jones. But before that appointment, in November 2000 claimant fell and experienced more intense pain in his right ankle when his crutch slipped in a wet spot on a recently mopped floor. When asked by respondent and its insurance carrier’s attorney about claimant’s November 2000 accident, claimant testified that the doctor who saw claimant for the El Dorado prison told claimant he had merely bruised the right ankle. Moreover, claimant also testified that Dr. Jones told him that he had not injured the right ankle in the fall. Claimant testified, in part:

Q. (Mr. Kruse) Did they [the El Dorado doctors] also take x-rays there after the fall?

A. (Claimant) Yes, they did.

Q. And do you know what the doctor at El Dorado said to you after the fall about what may have occurred?

² P.H. Trans. (Feb. 13, 2001), Resp. Ex. A.

³ *Id.*, Resp. Ex. C at 26.

⁴ R.H. Trans. at 19-20.

A. Nothing. He just said it [the right ankle] was bruised.

. . . .

Q. When you went to see Dr. Jones, did you tell him about your fall at El Dorado Correctional Facility?

A. Yeah.

. . . .

Q. What, if anything, did he tell you about what had occurred from the fall?

. . . .

A. . . . He said nothing happened from the fall.

Q. And did he tell you why he wanted to perform an additional surgery?

. . . .

A. He said that my fibula was not healing correct, that the pain that I was having was due to my ankle growing crooked, that there was -- he took x-rays of both feet and there was a space on -- a space difference in both feet that was making my ankle grow crooked.⁵

Dr. Jones did not testify.

6. According to claimant, in early December 2000 Dr. Jones performed a bone graft on the right fibula and replaced a plate. And two weeks later, the doctor removed the staples. Claimant attended at least one follow-up visit with Dr. Jones but missed any others as he was released from the El Dorado prison and did not have transportation to drive to Wichita.

7. Following surgery from Dr. Jones, claimant continued to experience symptoms and returned to Dr. Wertzberger for treatment. In August 2001, Dr. Wertzberger performed arthroscopic surgery in which he unroofed a nerve that he thought was entrapped. When the doctor saw claimant in follow-up on September 7, 2001, the doctor had no other treatment to offer claimant.

⁵ P.H. Trans. (Feb. 13, 2001), Resp. Ex. C at 47-48.

8. According to Dr. Wertzberger, claimant now has a 15 percent functional impairment to the right lower extremity under the American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). The doctor also testified that he believed claimant would have reached maximum medical improvement on approximately December 3, 2001, despite an earlier statement that claimant had reached maximum medical improvement as of September 7, 2001. Dr. Wertzberger speculated that claimant may have sustained a slightly less (maybe a couple of percentage points) functional impairment if he had attended all of his scheduled physical therapy appointments.

9. Dr. Wertzberger initially testified that he did not believe that claimant's November 2000 fall on crutches impacted claimant's March 8, 2000 injury. But after being reminded of a February 12, 2001 letter that he had written to respondent and its insurance carrier's attorney, the doctor stated that he assumed the fall aggravated claimant's ankle, resulting in Dr. Jones' surgery, which delayed claimant from reaching maximum medical improvement. Dr. Wertzberger emphasized, however, that these opinions were based upon assumptions as he did not have the opportunity to examine claimant's x-rays that were taken in November 2000 at the El Dorado prison or Dr. Jones' postoperative x-rays.

10. The Board affirms Judge Avery's finding that claimant has sustained a 15 percent functional impairment to the right lower extremity as a result of the March 8, 2000 accident. Dr. Wertzberger's testimony that claimant may have been impaired slightly less had he attended all of his physical therapy appointments is speculative.

11. The Board concludes claimant is entitled to temporary total disability benefits for the period from February 13, 2001, through May 31, 2001. The Workers Compensation Act does not provide that temporary total disability benefits cease when an incapacitated worker is incarcerated. Moreover, the Board concludes claimant's injury would have prevented him from working regardless of his imprisonment. The Board is unaware of any decision in which a Kansas appellate court has decreed public policy demands that temporary total disability benefits should be terminated under these circumstances. But the Board has found a number of decisions from other jurisdictions in which those courts have held that disability benefits should not be terminated due to the lack of statutory authority or due to the fact that a prisoner's dependents relied upon the disability compensation.⁶ Because the Kansas Workers Compensation Act lacks statutory authority to terminate benefits in these circumstances, the Board rejects respondent and its insurance carrier's argument that they should be relieved from paying temporary total disability benefits while claimant was incarcerated.

⁶ See 3 *Larson's Workers' Compensation Law* § 64.03[7] (2001).

12. Claimant is also entitled to receive temporary total disability benefits for the period through December 3, 2001. Based upon Dr. Wertzberger's testimony, the Board concludes that as of December 3, 2001, claimant reached maximum medical recovery from his right ankle and leg injuries and, therefore, his medical status changed from temporary to permanent.

13. The Board also concludes that claimant's November 2000 fall did not affect his right ankle injury. That conclusion is based upon claimant's testimony of what the doctors at the El Dorado prison told him and what Dr. Jones told him. Respondent and its insurance carrier's attorney elicited those statements from claimant, which were not later contradicted as neither the prison doctors nor Dr. Jones testified in this claim.

In the alternative, the Board also finds and concludes that the November 2000 fall was a direct consequence of the March 8, 2000 accidental injury as claimant was on crutches at the time of the fall due to the severe pain that he was experiencing in his right ankle and leg as his injuries had not properly healed. Claimant fell when his crutch slipped on a wet floor. Accordingly, the November 2000 fall is a direct consequence of the original accident and any injury that claimant may have sustained in that fall should be compensated along with the original injury.

When a primary injury under the Workmen's Compensation Act arises out of and in the course of employment every natural consequence that flows from the injury is compensable if it is a direct and natural result of the primary injury.⁷

14. Based upon the above findings and conclusions, the Board affirms the conclusion that claimant is entitled to receive permanent disability benefits for a scheduled injury to the right lower leg based upon a 15 percent functional impairment. But the Award and Nunc Pro Tunc Award should be modified to award claimant temporary total disability benefits for the entire period from the date of accident through December 3, 2001.

AWARD

WHEREFORE, the Board modifies the April 26, 2002 Award and the May 1, 2002 Nunc Pro Tunc Award, as follows:

Dustin Bennett is granted compensation from Scott Masonry, Inc., and its insurance carrier for a March 8, 2000 accident and resulting disability. Based upon an average weekly wage of \$522.35, Mr. Bennett is entitled to receive 90.71 weeks of temporary total disability benefits at \$348.25 per week, or \$31,589.76, plus 14.89 weeks of permanent

⁷ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, Syl. ¶ 2, 564 P.2d 548 (1977).

partial disability benefits at \$348.25 per week, or \$5,185.44, for a 15 percent permanent partial disability, making a total award of \$36,775.20, which is all due and owing less any amounts previously paid.

The Board adopts the remaining orders set forth in the Award and Nunc Pro Tunc Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of November 2002.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Frank D. Taff, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Brad E. Avery, Administrative Law Judge
Director, Division of Workers Compensation